"ADJUDICATION ON THE MERITS" UNDER THE AEDPA

William P. Welty[*]

"At some point in the judicial process, even a person convicted of heinous crimes deserves a rigorous and complete analysis of his constitutional claims. If no state court provides such analysis, this task falls to the federal courts."[**]

INTRODUCTION

The Anti-Terrorism and Effective Death Penalty Act ("AEDPA") radically revised federal habeas corpus procedure in 1996.[1] It "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners,"[2] dramatically curtailing the ability of federal courts to review state court decisions for constitutional error and mandating that far greater deference be paid to those state decisions. There can be no doubt that Congress intended to alter the way in which federal courts reviewed state court decisions.[3] However, more than five years after the AEDPA became law, federal courts are still adjusting to its restraints, as the Supreme Court and the Courts of Apeals continue to work through the language of the statute, trying

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[*] J.D. Candidate, 2003, University of Pennsylvania Law School; B.A. 2002, University of Pennsylvania. I would like to thank Judge Franklin S. Van Antwerpen, who introduced me to the fascinating intricacies of habeas corpus while I worked in his chambers. I would also like to thank the staff and Board of the *Journal of Constitutional Law.*

[**] Bell v. Jarvis, 236 F.3d 149, 186 (4th Cir. 2000) (Motz, J., dissenting).

[1] 28 U.S.C. § 2254(d) (2000).

[2] Williams v. Taylor, 529 U.S. 362, 399 (2000) (O'Connor, J., concurring). I will refer to this case as *Terry Williams v. Taylor*, or *Terry Williams* to avoid confusion with *Michael Wayne Williams v. Taylor*, 529 U.S. 420 (2000), another habeas corpus case from the 2000 Term.

[3] *See, e.g.*, Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997):

> A federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of the court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness.

to determine exactly how Congress intended federal habeas review to work.

In particular, many federal courts are chafing under the restrictions of the AEDPA as they find themselves unable to decide federal claims that state courts have reviewed only superficially. As these federal courts look to assert themselves, conflicts have emerged over whether the AEDPA allows federal courts any discretion at all in reviewing state decisions under habeas corpus. I will be exploring the development of this conflict, and in particular the debate over the meaning of "adjudication on the merits" under Section 2254(d)(1) of the AEDPA.[4]

In this Comment, I will argue that the Supreme Court must determine the meaning of "adjudication on the merits" in the AEDPA so that a uniform habeas process can be crafted. In Part I, I trace the history of habeas, pointing out that the broadening and narrowing of the writ generally corresponds to political pressure. In Part II, I discuss the AEDPA and its effect on habeas procedure. In Part III, I examine the Second Circuit's struggle with the meaning of adjudication in the summer of 2001, and move on to consider the view of other circuits in Part IV. Finally, in Part V, I critique the various definitions and suggest that a speedy resolution to this debate is critical in order to ensure the consistent and fair judgment of constitutional claims.

I. THE HISTORY OF HABEAS

The writ of habeas corpus serves a basic function, allowing federal court review of a criminal conviction for constitutional errors, thus ensuring fair and thoughtful application of the law.[5] Despite judicial and legislative alterations that reflect great changes in the legal conception of habeas corpus, the writ has a long history of serving as a fundamental protector of civil rights in the Anglo-American legal tradition.

Described by Blackstone as "the most celebrated writ in the English law,"[6] habeas corpus officially became English law in 1641.[7] It was then carried across the Atlantic, embodied in American law during

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[4] 28 U.S.C. § 2254(d) (2000).

[5] Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong With It and How to Fix It*, 33 CONN. L. REV. 919, 921 (2001).

[6] 3 WILLIAM BLACKSTONE, COMMENTARIES *129.

[7] Williams, *supra* note 5, at 921.

the colonial period, and ultimately guaranteed in the Constitution.[8] After the Civil War, along with other measures strengthening civil rights, Congress passed the Habeas Corpus Act of 1867 allowing the writ, previously only available to federal prisoners, to be used by state prisoners as well.[9]

Habeas corpus began its doctrinal transformation in the 1920s, but ultimately became a viable means of litigating federal constitutional claims arising from state court decisions under the Warren Court.[10] Inevitably, there was a conservative reaction to this broadening of the availability of the writ. These commentators felt that the Warren Court's decisions failed to consider the impact of such a broadening on the resources of law enforcement and prosecutors.[11] The Burger Court, meanwhile, announced its concern with the burden that a broad writ imposed on federal courts, using up resources that could be devoted to other matters.[12] Additionally, members of the Court expressed concern with what they considered to be the newly transformed writ's assault on federalism.[13] Ultimately, the Burger and Rehnquist Courts (particularly the Rehnquist court in the late 1980s and early 1990s) began to curtail the writ, erecting barriers that blocked the availability of habeas to those who did not meet procedural obligations, and dramatically cutting down on the number of defendants who could have their claims heard in federal court.[14]

II. THE AEDPA AND ADJUDICATION

In the wake of the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, there was a renewed effort to legislatively

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[8] Fay v. Noia, 372 U.S. 391, 400 (1963). *See also* U.S. CONST. art. I, § 9, cl. 2. ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").

[9] Habeas Corpus Act of 1867, ch. 27, 14 Stat. 385 (1867) (amending the Act of 1866, ch. 80, 14 Stat. 46 (1866)).

[10] Larry W. Yackle, *The Habeas Hagioscope*, 66 S. CAL. L. REV. 2331, 2341-48 (1993). *See also* Sanders v. United States, 373 U.S. 1 (1963); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963). These cases were part of the general liberalization of criminal procedure that the Warren court launched in the 1960s.

[11] Yackle, *supra* note 10, at 2351-52.

[12] *Id.* at 2356.

[13] *Id.*

[14] *See* Kenneth Williams, *The Deregulation of the Death Penalty*, 40 SANTA CLARA L. REV. 677 (2000); Larry W. Yackle, *The Figure in the Carpet*, 78 TEX. L. REV. 1731, 1734-48 (2000). *See also* Brecht v. Abrahamson, 507 U.S. 619 (1993) (setting conviction aside on habeas review); McKleskey v. Zant, 499 U.S. 467 (1991) (holding habeas corpus petition unsuccessful); Teague v. Lane, 489 U.S. 288 (1989) (denying habeas corpus petition); Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that there was no "cause" or "prejudice" for habeas corpus review).

follow in the Rehnquist Court's judicial footsteps, curtailing the availability of habeas corpus in order to fight crime and lessen lengthy criminal litigation.[15] The procedural limitations on habeas imposed by the Rehnquist court restricted the availability of habeas to defendants who did not meet certain procedural hurdles. However, Congress was interested in legislatively streamlining habeas and limiting, in certain instances, the ability of federal courts to grant the writ at all.[16] Ultimately, the Act achieved this purpose by declaring simply:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.[17]

The statute clearly seeks to limit grants of habeas—this much is clear from the plain language of the statute,[18] as well as the legislative record.[19] However, the AEDPA does not clearly define the limitations it places on federal courts' scope of review. Federal courts were simply unable to discern Congress' intent, and consequently applying the statute consistently, without clarification from the Supreme Court, proved to be cumbersome.[20]

In *Terry Williams v. Taylor*, the Supreme Court attempted to resolve an increasingly contentious split among the circuits.[21] The Court interpreted the language of Section 2254(d) in order to clarify confusion among the Circuits regarding the standard of review that federal courts should employ when examining adjudicated claims on habeas.[22] In a long and rather complicated opinion written in part by Justice Stevens and in part by Justice O'Connor, the Court finally articulated what constituted "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal

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[15] Williams, *supra* note 5, at 923.

[16] *Id.*

[17] 28 U.S.C. § 2254(d) (2000).

[18] *Id.*

[19] *See, e.g.*, Washington v. Schriver, 255 F.3d 45, 62-63 (2d Cir. 2001) (Calabresi, J., concurring) (reviewing Congressional purposes in adopting standard of review for habeas cases).

[20] *See, e.g., Terry Williams v. Taylor*, 529 U.S. 362 (2000).

[21] *Id.*

[22] *Id.*

law" under Section 2254(d)(1).[23] Disagreeing with Justice Stevens, Justice O'Connor concluded for the Court that the "contrary to" and "unreasonable application" prongs of Section 2254(d)(1) should be applied separately.[24] A federal court can grant the writ on the "contrary" prong if the state court arrived at a conclusion opposite that reached by the U.S. Supreme Court on a question of law or if the state court decided a case differently from the Supreme Court on a set of materially indistinguishable facts.[25] A court could grant the writ on the "unreasonable application" prong if the state court identified the correct legal principles as dictated by the Supreme Court, but unreasonably applied them to the facts of the petitioner's case.[26]

Terry Williams has done much to clarify the meaning of the AEDPA and cure the circuit split over its interpretation, but the opinion leaves open a gaping hole regarding what standard of review a court should employ when a state court simply fails to apply federal law. In short, while *Terry Williams* clarified the AEDPA considerably, it also greatly reduced the ability of federal courts to finesse the meaning of the statute, an action that had formerly allowed the courts to retain much of their pre-AEDPA power. However, the procedural posture dictated by *Terry Williams* applies only to cases covered by Section 2254(d) and is thus limited by the statute's own language to state court decisions "adjudicated on the merits."[27] Petitioners wishing to secure *de novo* review, and some courts eager to retain that power, seized upon this confusion over the language of the AEDPA to argue that, absent such an adjudication, *de novo* review was required.[28] However, the exact meaning of this phrase remains open to debate, and as courts have attempted to apply *Terry Williams* and the AEDPA to state court decisions that do not adequately discuss federal law, a circuit split and considerable intra-circuit tension has resulted.

It is important to understand that the debate over "adjudication on the merits" is not simply limited to a linguistic meaning, and indeed the debate is not even confined to a consideration of what Congress meant by the phrase. The dispute over adjudication is, in fact, the next phase of a long battle over the meaning and role of habeas corpus in the criminal process, the perceived abuse of the writ by convicted criminals, and perhaps most importantly, the role of fed-

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[23] *Id.*

[24] *Id.* at 404-05.

[25] *Id.* at 405-06.

[26] *Id.* at 407.

[27] *See* 28 U.S.C. § 2254(d) (2000); *Terry Williams*, 529 U.S. 362 (2000).

[28] *See, e.g.*, Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998) (holding that no claims presented in the defendant's cross-appeal provided a basis for habeas relief).

eral courts in state proceedings. Thus, what might seem on its face to be a relatively limited question of statutory construction, is in fact a very important debate that will have a direct impact on the criminal justice system, and beyond that, broad implications on the larger debate over the role of state courts in our federal system.

When a claim with a strong constitutional issue is presented to a federal court on a petition for a writ of habeas corpus, the AEDPA, as interpreted by the Supreme Court in *Terry Williams*, greatly constrains the court's ability to review the decision.[29] In an ideal world, of course, a state court would have recognized and corrected the constitutional violation, either on direct appeal or, in capital cases, during post-conviction relief.

The belief that state courts will be vigilant in applying the Constitution is the basis for the principles of comity and federalism that have always limited federal review of state decisions on habeas corpus appeal, and that were ultimately explicitly adopted in the AEDPA.[30] However, the reality seems to be that valid claims are often overlooked or under-analyzed by state courts.[31] In these situations of substandard state court review, a federal court which might have granted the writ after reviewing the case *de novo* (as it could before the AEDPA) would have to defer to the state court's reasoning, a decision required under the AEDPA as interpreted in *Terry Williams*. However, if the federal court finds that there was no state court adjudication on the issue, the federal court is freed from the strictures of the AEDPA, and can more directly address the constitutional claim *de novo*. Because the definition of "adjudication" affects the standard of review

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[29] *See, e.g.*, Sellan v. Kuhlman, 261 F.3d 303, 309-11 (2d Cir. 2001) ("By contrast, were we to review the relevant state court decision under the deferential standards now prescribed by AEDPA, it is plain that Sellan would not be entitled to the writ.").

[30] *See* 28 U.S.C. § 2254(d) (2000).

[31] *See, e.g.*, Washington v. Shriver, 255 F.3d 45 (2d Cir. 2001) (reviewing Congressional purposes in adopting the habeas standard of review); Neal v. Puckett, 239 F.3d 683 (5th Cir. 2001) (denying habeas relief where the state Supreme Court's conclusion that mitigating evidence of petitioner's life experience at sentencing was cumulative but incorrect was not an unreasonable application of federal law); Bell v. Jarvis, 236 F.3d 149 (4th Cir. 2000) (holding that the state court's rejection of peitioner's motion for appropriate relief was not an unreasonable adjudication of petitioner's Sixth Amendment claim); Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999) (stating that the deferential AEDPA standard does not apply where the state court does not decide the claim on its merits); Mercadel v. Cain, 179 F.3d 271 (5th Cir. 1999) (holding that petitioner had failed to exhaust remedies where his ineffective assistance claim had not been fairly presented to state courts); Hennon v. Cooper, 109 F.3d 330 (7th Cir. 1997) (restating that a court may not grant relief unless the adjudication resulted in a decision contrary to established federal law); Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996) (holding that under the amended federal law the court must ask whether the new provision attaches new legal consequences).

under which the claim is examined, in many cases the threshold decision on adjudication is "outcome-determinative."[32]

It is not difficult to perceive the many undesirable scenarios that could result from the continued confusion over the meaning of "adjudication on the merits" in the AEDPA. A federal court reviewing a state decision that it feels incorrectly denied a constitutional claim may attempt to review the claim *de novo* by finding that the state court failed to adjudicate on the merits. Perhaps worse, a federal court unable to grant habeas on a particularly strong constitutional claim because the claim was definitely adjudicated might instead grant the writ on a weaker claim that was not adjudicated, merely because it could wield its *de novo* review power. Similarly, state courts, aware of the deference their opinions, will receive under the AEDPA on habeas review—if only their decisions are not demonstrably unreasonable or contrary to federal law—might be tempted to give strong constitutional claims short shrift in order to give the federal habeas court less of a record to review, which consequently limits the ability of a federal court to find an unreasonable application of Supreme Court precedent.

In perhaps the worst scenario, state supreme courts might be tempted to summarily reject strong constitutional claims for fear that an extensive decision would give the federal habeas court sufficient grounds to make a finding of unreasonableness under *Terry Williams*, and thus review the state decision *de novo*.[33] I would argue that the Great Writ has fallen considerably from its once lofty perch when there is a risk of such judicial games being played.

III. THE SECOND CIRCUIT

On January 5, 2001, the Second Circuit Court of Appeals announced a controversial decision in *Washington v. Schriver*.[34] In *Washington*, the New York Appellate Division dismissed the petitioner's Due Process and Sixth Amendment claims without specifically addressing the federal issues.[35] The Second Circuit's opinion in *Washington* held that *Terry Williams* could not be applied when the state court decision under review did not cite Supreme Court precedent or

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[32] Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001).

[33] Judge Calabresi of the Second Circuit suggests several other reasons why the current confusion over adjudication on the merits is unproductive. They will be discussed in the following Part regarding the recent debate in the Second Circuit.

[34] 240 F.3d 101 (2d Cir. 2001).

[35] *Id.* at 106.

at least state decisions that cited such precedent.[36] The opinion also held that state court judges would be required to undertake a thorough analysis of federal claims in order to qualify for deference under the AEDPA.[37] The decision provoked an uproar in New York, where it was estimated that up to seventy-five percent of direct appeals involved federal claims and that the additional analysis mandated by *Washington* would be "onerous."[38]

In an unusual move, the same panel withdrew its opinion in *Washington* and issued an amended opinion on July 2, 2001, which decided the case on different grounds, declining to render a decision on the adjudication requirement of Section 2254(d).[39] This time, the court noted the two schools of thought on the adjudication requirement but did not reach the issue, determining that Washington's claim failed under any standard.[40] The court noted in *dicta* that at least six justices in *Terry Williams* seemed to endorse a definition of "adjudication" that would apply only if the state court in some way identified the legal principles it was utilizing in the decision.[41]

In a concurring opinion that addressed, and expanded upon, many of the issues included in the original (withdrawn) opinion, Judge Guido Calabresi made clear both his dissatisfaction with the current confusion over the adjudication requirement, and his preference for a definition of adjudication that would require state courts to thoroughly examine federal constitutional claims citing Supreme Court precedent.[42] Calabresi wrote:

> [W]e do State courts no favor by declining to determine, and as soon as possible, that the pre-AEDPA standard of review should indeed be applied in cases like this one—cases, that is, in which State courts have rejected a petitioner's federal constitutional claim without specifically addressing it (even if only by citing to federal case law or to State court decisions that apply federal law).[43]

While encouraging the Circuit to develop a standard for defining adjudication, Calabresi himself also advocated a stringent definition of

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[36] *Id.* at 108.

[37] *Id.* at 107-10.

[38] John Caher, *Circuit Lifts Burden On Appellate Judges: State Courts Need Not Address Every Federal Issue*, N.Y.L.J., June 19, 2001, at 1.

[39] Washington v. Shriver, 255 F.3d 45, 48 (2d Cir. 2001).

[40] *Id.* at 55.

[41] *Id.* at 53. ("Another approach would find that unexplained, summary dismissals of federal claims are not adjudications on the merits. This approach looks to the view of at least six justices in [*Terry*] *Williams v. Taylor* that the substance of the state court decision should be examined . . . .").

[42] *Id.* at 62 (Calabresi, J., concurring).

[43] *Id.* at 61-62.

adjudication, which would require state decisions to cite Supreme Court precedent, or at least other state decisions which in turn cite Supreme Court precedent, in order to qualify for federal court deference.[44]

In his analysis of the AEDPA, Calabresi reviewed the statute's legislative history and noted that Congress had changed habeas procedure in order to both end perceived abuses of the writ through endless litigation and ensure deference to co-equal state courts.[45] However, Calabresi found numerous possible negative effects stemming from the streamlining of habeas procedure, noting:

> [T]he AEDPA runs the risk of imposing a heavy, and sometimes unwanted and unmanageable, burden on State courts. Specifically, if AEDPA deference were deemed automatically and universally to apply, then that law would require extremely busy State court judges to figure out what can be very complicated questions of federal law at the pain of having a defendant incorrectly stay in prison should the State court decision of these complex questions turn out to be mistaken (but not unreasonably so). Indeed, under such a reading of the AEDPA, the only alternative to this outcome would be the highly undesirable one of having federal courts reviewing State court decisions on habeas frequently declare such decisions to be not just mistaken but also unreasonable.[46]

Calabresi concluded that, because federal courts would not be so bold as to rampantly declare state court decisions unreasonable if a strict construction of the AEDPA adjudication requirement were adopted, state courts would be forced to decide numerous difficult federal issues against their will.[47]

Calabresi, however, fails to consider, as a threshold matter, that the risks and burdens of changing habeas procedure are not his or the court's to determine, and that the delineation of habeas procedure is the province of the Congress, not Article III courts.[48] Additionally, he fails to realize that state courts are required to adjudicate the claims before them—there is no reason they should be encouraged by the Court of Appeals or a broader judicial policy to defer

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[44] *Id.* at 63.

[45] *Id.* at 62.

[46] *Id.*

[47] *Id.* at 62-3:

> State courts would inevitably be led to do a lot of work on all federal questions, no matter how difficult, in order to avoid mistaken, but not unreasonable, decisions. And they would do so regardless of whether they wished to spend the time arriving at deeply thought out judgments on such hard federal questions.

[48] Yackle, *supra* note 10, at 2337-41 (noting that while both Congress and the courts have influenced the development of habeas corpus, Congress has responsibility for drafting the law of habeas corpus).

judgment to the federal courts. Indeed, the plain meaning of the AEDPA, as well as governing principles of federalism, prevent the deferral of judgment on direct or post-conviction appeal to another court.[49] The clear thrust of Calabresi's comment is that he does not trust state courts to competently decide complex federal questions, and would be far more comfortable leaving the claims to federal courts.

The mistrust of state courts that characterizes Calabresi's dissent seems to be an important, if unspoken, component of the argument for a definition of adjudication that would require articulated reasoning by state courts. The end result of such a requirement would almost certainly be a decline in the number of state decisions that are deemed to have been "adjudicated," thus leaving more constitutional claims subject to *de novo* review by federal courts. However, this formulation seems to defy the spirit of the AEDPA, and returns the habeas process, at least for complex questions, to its pre-1996 formulation.

Calabresi then moves on to consider his preferred interpretation of the adjudication requirement, in which the citation of Supreme Court precedent, or state decisions relying on Supreme Court precedent, would constitute an adjudication, and thus trigger AEDPA deference.[50] He argues that this structure

> presents State courts with a powerful linguistic device by means of which they can command deference concerning the issues they wish to decide, and pass on for *de novo* review the issues they prefer to avoid . . . . permit[ing] them to exercise that control over their judicial resources which a true respect for state sovereignty requires.[51]

Calabresi offers no support for his contention that states even have the option of deferring judgment on federal claims, and while novel, his theory that this shows true respect to state sovereignty rings hollow.[52] Calabresi's support of sovereignty merely encourages state courts to realize, of their own accord, that they are not competent to decide federal questions.

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[49] 28 U.S.C. § 2254(d) (2000).

[50] Washington v. Schriver, 255 F.3d 45, 63 (2d Cir. 2001) (Calabresi, J., concurring).

[51] *Id.*

[52] *See* Sellan v. Kuhlman, 261 F.3d 303, 314 (2d Cir. 2001) ("The notion that state courts may absolve themselves of their duty to decide federal questions has no basis in the law. Under the Supremacy Clause, state courts are obligated to apply and adjudicate federal claims fairly presented to them.") (citing U.S. CONST. art. VI, cl. 2; Testa v. Katt, 330 U.S. 386 (1947)).

The amended opinion in *Washington* sent shockwaves throughout the Second Circuit.[53] Though the panel backed off their original interpretation of adjudication, Calabresi's concurrence made it seem that the Circuit might ultimately be headed toward a strict definition of adjudication, which some thought would waste judicial resources.[54] However, the matter was ultimately resolved quickly when, in August 2001, a different panel of the Second Circuit delivered its opinion in *Sellan v. Kuhlman.*[55]

Sellan was a habeas appeal that urged the court to review its federal constitutional claims *de novo* because the Appellate Division in New York had summarily dismissed the petitioner's claim without comment.[56] The Circuit Court considered, as a threshold question, what level of deference it was required to give to the summary dismissal under the AEDPA, and more specifically, "whether a state court decision as to a particular federal claim can constitute an 'adjudication on the merits' within the meaning of AEDPA even when the state court does not explicitly refer to the federal claim or to relevant federal case law."[57]

Writing for a unanimous court, Chief Judge John Walker, Jr. first distinguished the case from *Washington,* and noted why the issue of "adjudication on the merits" is such an important one, both for habeas procedure generally, and in particular for those defendants with capital sentences:

> Sellan's Sixth Amendment claim is a forceful one—the state law argument that Sellan's counsel failed to raise on direct appeal is quite strong. . . . Accordingly, were we to review Sellan's Sixth Amendment claim *de novo,* we might well be inclined to grant the writ. By contrast, were we to review the relevant state court decision under the deferential standards now prescribed by AEDPA, it is plain that Sellan would not be entitled to the writ . . . . In short, whether AEDPA deference applies here is all but outcome-determinative.[58]

Walker then moved on to consider the text of the AEDPA itself. Rather than first examining legislative history, or the intent of Congress in passing the AEDPA, Walker jumps right into the statute, noting that, "When Congress uses a term of art . . . we presume that it speaks consistently with the commonly understood meaning of this

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[53] Caher, *supra* note 38, at 1 ("Six months ago, the U.S. Court of Appeals for the Second Circuit issued a decision that sent shudders through New York's appellate courts.").

[54] *Id.*

[55] *Sellan,* 261 F.3d 303.

[56] *Id.* at 307-12.

[57] *Id.* at 311.

[58] *Id.* at 310.

term."[59] Examining the definition of "adjudication" in Black's Law Dictionary, as well as Webster's, the court concludes that there is no implicit requirement of either explanation or citation in order for a decision to be adjudicated.[60] The court, citing the Fourth Circuit's definition of adjudication, simply notes that, when no explanation is forthcoming in a state court decision, the federal court must focus its review on whether the *ultimate decision*, not the reasoning, complied with the *Terry Williams* test.[61]

As noted earlier, one of the great weaknesses in the habeas process under the AEDPA that a Calabresi-type formulation of adjudication attempts to remedy, is that federal courts deferentially reviewing state decisions often have very little substantive legal argument or citation to base their reasonableness evaluation on. Walker concedes that "a state court's explanation of the reasoning underlying its decision would ease our burden," but determines that the absence of such reasoning does not change the role of federal courts in the habeas process, as mandated by Congress in the AEDPA.[62] This clearly reveals the fundamental difference between judges like Calabresi, who are perhaps wary of state court decisions generally, and in particular seem to be hesitant to defer to summary decisions, and judges like Walker, who betray no particular feeling on the subject but interpret the AEDPA rather rigidly to generally mandate deference to state courts in all but the most extreme cases. Walker seems to have determined that, under the AEDPA and *Terry Williams*, the chances of granting a habeas petition are very slight, and that this is the will of Congress.[63] Calabresi seems equally determined to preserve a role for federal courts in the habeas process—even if it means tweaking the Circuit's definition of adjudication to ensure that state courts produce longer, more well-reasoned opinions.

Ultimately, one motivation behind the Second Circuit's formulation may well have simply been a reluctance to express grave doubts about the state court system's ability to fairly adjudicate claims.[64] Walker, for one, seems unwilling to pass such a critical judgment on the New York state court system:

> If we were to . . . infer that an unconscionable breakdown occurred herein because the Appellate Division issued a summary affirmance

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[59] *Id.* at 311.
[60] *Id.* at 311-12.
[61] *Id.*
[62] *Id.* at 312.
[63] *Id.* at 308-14.
[64] *Id.* at 312.

> rather than a written opinion, not only would this reflect doubt regarding the capabilities of the New York courts as fair and competent forums for the adjudication of federal constitutional rights, but this would also place us in the position of dictating to state courts that they must issue opinions explicitly addressing the issues presented or else face 'second guessing' by the federal courts. [65]

Walker correctly points out that one of the fundamental reasons that the AEDPA became law was that Congress was concerned that state courts were not being given their proper deference. Walker follows this legislative directive to its logical conclusion, finding himself unable to question the competency of the state court system to hear constitutional claims, thus affirming their often dispositive role in the habeas process. However, in articulating his support of the state system, Walker fails to consider the not unrealistic possibility that state courts will continue to avoid citing federal precedent in order to secure deferential review and avoid reversal by federal courts.

Addressing Calabresi's concurring opinion in *Washington* directly, Walker questions the validity of the form of words that Calabresi advocates could trigger deferential review.[66] Walker contends that such a formulation would encourage prisoners to submit federal claims in a "cursory manner," which would allow them to exhaust the claims while perhaps gaining federal *de novo* review when state courts grant summary dismissal.[67] Walker surmises that this would ultimately result in a system where state claims are decided in state court while federal claims are preserved on state appeal, but ultimately decided in federal court on habeas appeal—this division is not based on any law, and indeed seems to contravene the Supremacy Clause.[68]

It is interesting that Walker seems to have great faith in the ability of state courts to properly adjudicate complex questions on summary judgment—indeed his opinion is premised on this assumption—but he does not seem to have great confidence in the ability of state courts to see through a petitioner's ruse of exhausting an issue in state proceedings while tricking the state court into not adjudicating the claim. He seems to be simultaneously confident in a state court's ability to properly dismiss federal claims without comment or citation, and concerned that it might fall prey to a rather elementary legal trickery. Additionally, Walker fails to consider the possibility that state courts may be canny enough not only to grasp a petitioner's

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[65] *Id.* (quoting Capellan v. Riley, 975 F.2d 67, 72 (2d Cir. 1992)).

[66] *Id.* at 313-14.

[67] *Id.*

[68] *Id.* at 314.

trick, but also might be able to utilize the AEDPA to their own advantage—securing deference while purposely deciding the case with minimal commentary in order to avoid any grounds upon which to be found unreasonable on federal habeas appeal.

Additionally, in suggesting that petitioners may attempt to use trickery to secure federal review, Walker does not reveal why federal review would benefit a petitioner. One can surmise that the benefit derives from the fact, which generally lies at the heart of this entire debate, that federal courts reviewing constitutional claims *de novo* are more willing to grant habeas petitions than state courts are willing to overturn capital sentences on direct or post-conviction appeal.[69]

Curiously, in refuting Calabresi, Walker notes two arguments that the *Washington* concurrence could have made, but did not. Walker writes that Calabresi failed to argue that a rule giving broad deference to a state court decision without well-articulated reasoning leaves open the possibility that federal courts will incorrectly decide the reasoning behind a state decision or that such a rule might simply make less work for federal courts.[70] He implies that such arguments might be more convincing than those which Calabresi makes; yet the ultimate decision of the court, endorsing the strict definition of adjudication, shows Walker found neither to be persuasive.

IV. THE OTHER CIRCUITS

Other circuits have had an equally difficult time determining the meaning of adjudication under the AEDPA, and this genuine confusion highlights the serious need for Supreme Court clarification of the issue.

A. The Majority View: The Fourth, Fifth, Seventh, and Tenth Circuits

The majority view of "adjudication on the merits," ultimately adopted by the Second Circuit in the summer of 2001, has been articulated in various ways by many circuits, but each definition is fundamentally similar. Each of the circuit courts that hold this majority view has adopted a narrow definition of "adjudication on the merits," meaning that any decision whatsoever is an adjudication under the AEDPA.

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[69] *See, e.g.*, Williams, *supra* note 14, at 682 (discussing the numerous pressures on state courts which make them less likely to properly review an appeal).

[70] *Sellan*, 261 F.3d at 313.

1. *The Tenth Circuit*

The Tenth Circuit appears to be a leader in articulating a literal definition of adjudication, which would dictate deference for all state court decisions. In *Aycox v. Little*,[71] the court determined that it would not need to defer to a decision that was not decided on the merits.[72] However, in the case itself, there was no evidence that the state court did not reach the merits of the claim in granting summary dismissal, and the opinion thus qualified for deference under the AEDPA.[73] Lacking any articulated reasoning on which to base its review, the court instead conducted an independent review of the record and federal law to determine if the state decision was unreasonable.[74] Because the court ultimately found no evidence that the decision was not based on the merits, it is unclear what sort of evidence the Tenth Circuit might require to find there was no adjudication. After all, a summary opinion would, by definition, seem to offer no evidence of any kind as to its reasoning, which is, of course, the impetus behind this entire debate. Nevertheless, the Tenth Circuit took pains in *Aycox* to point out that its independent review of the record was not pre-AEDPA *de novo* review but rather deferential, because relief could not be granted unless the state decision was found "legally or factually unreasonable."[75]

2. *The Fourth Circuit*

The Fourth Circuit has determined that, when a state court decision does not articulate the reasoning behind its ruling, federal courts must nevertheless apply AEDPA deference automatically. Federal courts "may not 'presume that [the] summary order is indicative of a cursory or haphazard review of [the] petitioner's claims.'"[76] Indeed, the Circuit clearly held that a summary order is in no way inferior to a more reasoned opinion, and qualifies for equal deference under Section 2254(d)(1).[77] However, the Fourth Circuit does recognize that such deference is difficult to articulate in a well-reasoned opinion, when the brevity of a summary order makes a state court's

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[71] 196 F.3d 1174 (10th Cir. 1999).

[72] *Id.* at 1177.

[73] *Id.*

[74] *Id.* at 1177-8.

[75] *Id.* at 1178.

[76] Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (alteration in original) (quoting Wright v. Angelone, 151 F.3d 151, 157 (4th Cir. 1998)).

[77] *Id.* at 158.

own reasoning unclear.[78] The Fourth Circuit has formulated a standard of review which seems to fairly balance the deference mandated by Section 2254(d)(1) with the practical difficulty of deferring to an opinion without any legal reasoning.[79] Thus, federal courts in the Fourth Circuit must:

> conduct an independent examination of the record and the clearly established Supreme Court law, but . . . must still "confine . . . review to whether the court's determination 'resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.'"[80]

With *Bell*, the Fourth Circuit embraced the view of adjudication that most circuits have adopted, and explicitly rejected *Cardwell v. Greene*,[81] an earlier Fourth Circuit opinion that defined adjudication as requiring a full independent review of the federal claims when the state opinion had no articulated reasoning. Interestingly, while the *Cardwell* court found the Virginia Supreme Court's summary dismissal to be an adjudication, they nevertheless used the lack of articulated reasoning to exercise independent review.[82] The *Bell* court rejected this interpretation of the AEDPA, noting that the *Cardwell* court "improperly equated the 'reasonableness' requirement of Section 2254(d) with 'the quality of the reasoning,'"[83] a formulation rendered improper by *Terry Williams*.[84]

The *Bell* court agreed with the *Cardwell* opinion that any state court decision is an adjudication under the AEDPA, but determined that rather than *de novo* review, a federal court must independently review the record to determine if the state court decision was unreasonable under *Terry Williams*.[85] In short, the Fourth Circuit's standard of review under *Bell* requires federal courts to examine the record, articulate any possible reasons for summary dismissal of federal claims, and then defer to these reasons unless they violate the rigor-

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[78] *Id.*

[79] *Id.* at 158, 163.

[80] *Id.* at 158 (quoting Bacon v. Lee, 225 F.3d 470, 478 (4th Cir. 2000) (quoting 28 U.S.C.A. § 2254(d)(1)) (citations omitted).

[81] 152 F.3d 331 (4th Cir. 1998).

[82] *Id.* at 339 ("[B]ecause the state court decision fails to articulate any rationale for its adverse determination of Cardwell's claim, we cannot review that court's 'application of clearly established Federal law,' but must independently ascertain whether the record reveals a violation of Cardwell's Sixth Amendment right . . . .").

[83] Bell v. Jarvis, 236 F.3d at 159 (quoting Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997)).

[84] 529 U.S. 362 (2000).

[85] *Bell*, 236 F.3d at 158.

ous "reasonableness" standards of *Terry Williams*.[86] The court does not comment on the troubling fact that this will require federal courts to both articulate the reasoning behind the dismissal of an appeal and then defer to their own reasoning on habeas, nor does it indicate whether it finds this commingling of state and federal judicial responsibilities to be troubling.

Interestingly, the dissent in *Bell* concedes that a state court's summary dismissal is an adjudication, but still suggests that, because the state court failed to articulate its reasoning, independent review of the record is required just as it was in *Cardwell*.[87] In *Bell*, Judge Diana Gribbon Motz contends that under the federal court's independent review of the record the first step is to ascertain whether a constitutional violation has occurred, and then to determine if the state court's failure to find that violation was unreasonable.[88] Recall that the majority opinion in *Bell* held that a federal court must find all possible reasons for dismissal and may only overturn the verdict if it was improper under *Terry Williams*.[89] It is revealing that Motz opines in her dissent that, "[u]nder the AEDPA, federal courts have no business reversing even perfunctory state habeas decisions that are 'close' to the mark. A federal court must, however, find the mark when the state court fails to do so by issuing a summary decision."[90] The Fourth Circuit seems to disagree on exactly how courts should go about finding that mark, and while it is clear that in the Fourth Circuit any state decision at all will suffice as an adjudication, there is clearly disagreement over the amount of deference due to summary dismissals.

3. *The Seventh Circuit*

The Seventh Circuit has defined adjudication in a substantially similar manner, holding that "[n]othing in Section 2254(d) calls on state courts to fill their opinions with discussions that by their lights are unnecessary, as the price of avoiding *de novo* review in federal court."[91] The Seventh Circuit has also determined that requiring state court decisions to articulate their reasoning would, "place the federal court in just the kind of tutelary relation to the state courts

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[86] *Id.* at 163.

[87] *Id.* at 177 (Motz, J., dissenting).

[88] *Id.*

[89] *Id.* at 158-59.

[90] *Id.* at 183 (Motz, J., dissenting) (citation omitted).

[91] Lindh v. Murphy, 96 F.3d 856, 874 (7th Cir. 1996).

that the [AEDPA is] designed to end."[92] Contrasting the habeas review process with that of administrative agencies' decisions, which must clearly articulate their reasoning, or be sent back to the agency for reconsideration, Chief Judge Posner wrote in *Hennon v. Cooper* that under the AEDPA,

> [a] federal court in a habeas corpus proceeding cannot remand the case to the state appellate court for a clarification of that court's opinion; all it can do is order a new trial, though the defendant may have been the victim not of any constitutional error but merely of a failure of judicial articulateness.[93]

While not mandating any particular method for dealing with a lack of articulated reasoning, the Seventh Circuit clearly embraces the view, shared by many other circuits, that any state decision is an adjudication which should be accorded deference under the AEDPA.[94] The Seventh Circuit has not been particularly groundbreaking in articulating a definition for adjudication or constructing a framework which attempts to balance the rights enshrined in the writ of habeas corpus with the demands of the AEDPA. However, it has been more willing than most other circuits to explicitly concede that the primary goal of the AEDPA is to severely curtail the discretion of federal courts.[95]

4. *The Fifth Circuit*

The Fifth Circuit has articulated a test which is facially very different from that adopted by the Fourth, Seventh, and Tenth Circuits. In *Neal v. Puckett*, the court wrote that "adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural."[96] In *Mercadel v. Cain*,[97] the court determined that whether a state court's decision was procedural or substantive should be determined by considering:

> (1)what the state courts have done in similar cases;
>
> (2) whether the history of the case suggests that the state court was aware of any ground for not adjudicating the case on the merits; and
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> (3) whether the state courts' opinions suggest reliance upon procedural grounds rather than a determination on the merits.[98]

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[92] Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
[93] *Id.*
[94] *See, e.g., id.*; Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996).
[95] *Hennon*, 109 F.3d at 335.
[96] Neal v. Puckett, 239 F.3d 683, 686 (5th Cir. 2001).
[97] 179 F.3d 271, 274 (5th Cir. 1999).
[98] *Id.* at 274.

The Fifth Circuit's test is different from that of other circuits because it recognizes that a summary dismissal may be made on procedural grounds.[99] But, format aside, the Fifth Circuit's test is substantially similar to that of the Fourth and Tenth Circuits. Any substantive decision, however slight, is an adjudication deserving deference under the AEDPA.[100] So, while some state decisions which in other circuits might be reviewed under AEDPA's strict standards qualify for *de novo* review, most appeals would seem to meet the same fate as they would in most other circuits.

B. The Divided Sixth Circuit

The Sixth Circuit has not fallen into line with its sister circuits regarding a definition of adjudication. In *Doan v. Brigano*,[101] the Ohio Court of Appeals dismissed a Sixth Amendment claim without referring to constitutional case law, instead relying on Ohio's evidence rules. The Sixth Circuit held that:

> Because the Ohio Court of Appeals did not even identify in its opinion that Doan had a federal constitutional right to a fair and impartial jury that considers in its deliberations only the evidence presented against him at trial, the "unreasonable application" prong of § 2254(d)(1) does not govern our analysis. The Ohio Court of Appeals did not, as the Supreme Court defined an unreasonable application, correctly identify the governing legal principle only to unreasonably apply that principle to the particular facts of the case at hand. On the contrary, the Ohio Court of Appeals completely failed to identify Doan's Sixth Amendment rights in its analysis, implicitly holding that Ohio Evid. R. 606(B) trumps the constitutional arguments that the defendant raised.[102]

The court then concluded that failing to examine Doan's claim under the Sixth Amendment was unreasonable under *Terry Williams* because it was contrary to Supreme Court precedent.[103]

Though it is unclear, the Sixth Circuit seems to feel that ignoring the constitutional claim is akin to ruling contrary to Supreme Court precedent. However, the court does not reveal if this is because the decision itself was contrary to precedent or simply because the Ohio court applied Ohio evidentiary rules instead of Supreme Court

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[99] *Id.*

[100] *Neal*, 230 F.3d at 686.

[101] 237 F.3d 722 (6th Cir. 2001).

[102] *Id.* at 730-31 (citation omitted).

[103] *Id.* (citing Williams v. Taylor, 529 U.S. 362 (2000)).

precedent. In any case, the court then examined Doan's Sixth Amendment claim *de novo*.[104]

The *Doan* opinion circumvents the issue of adjudication as it has been discussed thus far in this comment, but nevertheless addresses several of the same substantive issues. Ultimately, the court was expressing its frustration over the strictures the AEDPA placed on it when faced with a poorly-crafted state court decision.[105] The solution created in *Doan*, which incorporates the reasonableness requirement of *Terry Williams*, does not purport to deal with adjudication, but in practice it is the same as the remedy which will be seen later in the Third Circuit's *Hameen*[106] opinion. Aside from the importance of Doan as an expression of a differing view on interpretation of the AEDPA, it is also notable simply as a case which clearly expresses the contortions of law that federal courts will go through in trying to bend the AEDPA so as to retain maximum power of review.

Aside from the confusing *Doan* doctrine, the Sixth Circuit has embraced the *Aycox*[107] formulation used by the Tenth Circuit, which calls for an independent review of the record and applicable law under the AEDPA when faced with a summary dismissal that does not reveal a state court's reasoning.[108] The court in *Harris v. Stovall*[109] maintained that, "[w]here a state court decides a constitutional issue by form order or without extended discussion, a habeas court should then focus on the result of the state court's decision, applying the [*Aycox*] standard."[110] The *Harris* decision implicitly accepts unreasoned state court opinions as adjudications despite the lack of articulated reasoning, sidestepping the debate which has occupied the other circuits.[111] Yet, ultimately, the *Harris* court was forced to deal with the serious problem of having no state court reasoning upon which to base its *Terry Williams* analysis.[112] Noting that a remand to the state appellate court for clarification was impossible (just as Chief Judge Posner noted in *Hennon*[113]), the *Harris* court found that habeas courts must focus on the *result* of the state court's decision.[114]

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[104] *Id.* at 730-36.
[105] *Id.*
[106] Hameen v. Delaware, 212 F.3d 226 (3d Cir. 2000).
[107] Aycox v. Lytle, 196 F.3d 1174 (10th Cir. 1999).
[108] Harris v. Stovall, 212 F.3d 940, 943 (6th Cir. 2000).
[109] *Id.*
[110] *Id.* at 943 n.1.
[111] *Id.* at 943.
[112] *Id.*
[113] Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997).
[114] *Harris*, 212 F.3d at 943 n. 1.

This discrepancy in the Sixth Circuit between the *Doan* and the *Aycox* views has not yet been clarified, but it does reveal that more than one circuit is troubled by the vagaries of the AEDPA.

C. *The First and Third Circuits—More Radical Requirements*

Finally, the First and Third Circuits have taken the most radical path in defining adjudication under the AEDPA. In *Fortini v. Murphy*,[115] the First Circuit found that the state court had not addressed the petitioner's constitutional claims and then reviewed the claims *de novo*.[116] In *Dibenedetto v. Hall*,[117] the court dealt with a habeas appeal from a state court ruling that had decided mixed claims based on both state and constitutional law solely on state law grounds. The court held that:

> If the state court has not decided the federal constitutional claim (even by reference to state court decisions dealing with federal constitutional issues), then we cannot say that the constitutional claim was 'adjudicated on the merits' within the meaning of § 2254 and therefore entitled to... deferential review.[118]

The First Circuit's definition of "adjudication on the merits" clearly seeks to balance Congress's clear intent to limit the scope of federal court review with the interest of habeas petitioners who may have claims that have not been addressed by an court. Interestingly, but not surprising under this balancing approach, the court has determined that if a mixed claim is decided solely on state law grounds, where state law is more favorable to the petitioner that constitutional law, the claim has been adjudicated and is due deference under the AEDPA.[119]

The Third Circuit has moved just as aggressively in an effort to define adjudication more narrowly. In *Hameen v. Delaware*,[120] the petitioner brought a habeas petition charging, *inter alia*, that the same aggravating factor was weighed twice in his capital sentencing, in violation of the Eighth Amendment.[121] In its opinion, the Delaware Supreme Court cited to its own cases, which in turn cited *Gregg v. Geor-*

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[115] 257 F.3d 39 (1st Cir. 2001).
[116] *Id.* at 44-45.
[117] 272 F.3d 1 (1st Cir. 2001).
[118] *Id.* at 6.
[119] McCambridge v. Hall, 303 F.3d 24 (1st Cir. 2002).
[120] 212 F.3d 226 (3d Cir. 2000).
[121] *Id.* at 246-47.

gia.[122] Concluding that the Delaware Supreme Court had "read *Gregg v. Georgia* too broadly,"[123] the Third Circuit ruled that the Delaware court had not taken into account Supreme Court precedent, and that as a consequence, there had been no "adjudication on the merits." The court then proceeded to apply pre-AEDPA *de novo* review to the claim, ultimately dismissing the habeas appeal.[124]

A subsequent case indicates that the Third Circuit is standing by its definition of "adjudication on the merits."[125] In *Jermyn v. Horn*,[126] the Third Circuit found that the Pennsylvania Supreme Court's reliance on a flawed lower court finding that improperly ignored one prong of a petitioner's Sixth Amendment claim rendered the court's ineffectiveness finding unreasonable, and thus not an "adjudication on the merits."[127] The Circuit found that the Pennsylvania Supreme Court's failure to decide a properly preserved claim simply did not qualify as an adjudication.[128]

Most recently, in *Chadwick v. Janecka*[129] the Third Circuit clarified and built upon its previous cases. Referring to the line of cases which had rejected AEDPA deference where state courts had not properly ruled on constitutional claims, the court stated, "[i]f an examination of the opinions of the state courts shows that they misunderstood the nature of a properly exhausted claim and thus failed to adjudicate that claim on the merits, the deferential standards of review in AEDPA do not apply."[130] However, the court also moved to limit the reach of this aggressive interpretation of the AEDPA, finding a distinction between those cases in which the state court did not properly hear a claim, to which deference would not have to be paid by a federal court, and those in which it rejected a claim without explanation, to which a federal court would have to defer under the AEDPA.[131] Unfortunately, the court's effort to limit the scope of *Hameen* seems to create an incentive for state courts to summarily reject habeas appeals, so that their opinions will not face rigorous pre-AEDPA *de novo* review.

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[122] 428 U.S. 153 (1976) (upholding death sentence when two arguably duplicative aggravating factors were considered twice); *see also Hameen*, 212 F.3d at 247.

[123] *Id.* at 248.

[124] *Id.*

[125] Jermyn v. Horn, 266 F.3d 257, 280-81 (3rd Cir. 2001).

[126] 266 F.3d 257 (3rd Cir. 2001).

[127] *Id.* at 299-300.

[128] *Id.* at 300.

[129] 312 F.3d 597 (3rd Cir. 2002).

[130] *Id.* at 606.

[131] *Id.* at 607.

The First and Third Circuit's interpretation of the adjudication requirement represents a distinct break from the requirements of the other circuits. Only the Fourth Circuit in *Cardwell*,[132] which the Fourth Circuit has since repudiated,[133] came close to formulating anything similar. Recall that in *Cardwell*, while the court agreed summary dismissal was an adjudication, it held that a lack of articulated reasoning prevented it from determining whether the Virginia Supreme Court has unreasonably applied Supreme Court precedent, and instead exercised pre-AEDPA review.[134] The First Circuit in *Dibenedetto*[135] and the Third Circuit in *Hameen*[136] go far beyond even the liberal *Cardwell*[137] standard, seemingly requiring state courts to reasonably apply federal law (as under *Terry Williams*) merely to qualify as an adjudication.

V. RESOLUTION OF THE SPLIT

It remains unclear how the debate over adjudication will ultimately be resolved. Indeed, it is important to realize that the true debate is not over "adjudication" as an abstract concept—the circuits are at odds, and indeed, judges within the circuits themselves clearly disagree, on the meaning of adjudication because of its immediate impact on the entire habeas corpus process. Chief Judge Walker correctly observed in *Sellan*[138] that determining whether a claim has been adjudicated on the merits under the AEDPA and *Terry Williams* can often be outcome-determinative. The great deference mandated by the AEDPA habeas procedure dictates that those petitioners who cannot receive *de novo* review will almost certainly see their claims dismissed.[139]

It is clear that many of the circuits are not even talking about the same issue when considering adjudication. Many circuits have taken the fairly direct view that adjudication is a word with plain meaning—any decision will suffice.[140] This straight-forward analysis is fundamen-

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[132] Cardwell v. Greene, 152 F.3d 331, 339 (4th Cir. 1998).
[133] Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000).
[134] *Cardwell*, 152 F.3d at 339.
[135] Dibenedetto v. Hall, 272 F.3d 1, 6 (1st Cir. 2001).
[136] Hameen v. Delaware, 212 F.3d 226, 248 (3d Cir. 2000).
[137] *Cardwell*, 152 F.3d at 339.
[138] Sellan v. Kuhlman, 261 F.3d 303, 310 (2d Cir. 2001).
[139] *Id.* at 313.
[140] *See, e.g.*, Bell v. Jarvis, 236 F.3d 149, 158 (4th Cir. 2000) (considering a state court decision to be a full adjudication even if a rationale is absent and denying the presumption of a haphazard review by the state court); Aycox v. Lytle, 196 F.3d 1174, 1177 (10th Cir. 1999) (considering a decision to be an adjudication on the merits absent evidence to the contrary); Lindh v. Mur-

tally different from the reasoning employed by those circuits and judges who look to the spirit of habeas corpus or Congressional intent in determining what adjudication is supposed to mean in this specialized context.[141] Both approaches differ from those opinions that frame the adjudication debate merely along substantive or procedural lines.[142] Finally, some decisions, while addressing the same fundamental concerns as all the other opinions, do not address adjudication at all, and instead frame the issue as one of reasonable application of Supreme Court precedent under *Terry Williams*.[143] It is, of course, conceivable that any of these methods is correct—and in fact it is probable that more than one, if not all, are perfectly reasonable—but this sort of debate nevertheless leaves the major issue unresolved: how should federal courts review state court decisions of constitutional claims that do not fully articulate their reasoning?

As a threshold matter it would seem essential for the Supreme Court to decide what qualifies as "adjudication on the merits" under the AEDPA simply to force federal courts into some sort of agreement on the issue. Such a decision, whatever it may be, would unify the habeas process across the circuits, and do much to clarify the AEDPA, which continues to befuddle federal courts as it moves into its seventh year as law. It is interesting that, in the capital sentencing context, the Supreme Court has long sought to remove any hint of arbitrariness so that death sentences might comport with the Eighth Amendment. As it stands now, because of the confusion over "adjudication on the merits" among the circuits, a simple difference of definition could result in completely (and some would say arbitrarily) different habeas rulings for similarly situated petitioners residing in

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phy, 96 F.3d 856, 874 (7th Cir. 1996) (stating that state court opinions should receive mere deference if they are well-reasoned).

[141] *See, e.g.*, Washington v. Shriver, 255 F.3d 45, 61 (2d Cir. 2001) (Calabresi, J., concurring) (stating that the court, by declining to determine whether the pre-AEDPA standard of review should be applied, did not do the state courts a favor); Hennon v. Cooper, 109 F.3d 330, 335 (7th Cir. 1997) ("[T]he criterion of a reasonable determination is whether . . . the determination is at least minimally consistent with the facts and circumstances of the case.").

[142] *See, e.g.*, Neal v. Puckett, 239 F.3d 683, 686 (5th Cir. 2001) ("In the context of federal habeas proceedings, adjudication 'on the merits' is a term of art that refers to whether a court's disposition of the case was substantive as opposed to procedural.") (citing Green v. Johnson, 179 F.3d 1115, 1121 (5th Cir. 1997)); Mercadel v. Cain, 179 F.3d 271, 274 (5th Cir. 1999) (using *Green*'s substantive/procedural test to determine whether there was an adjudication on the merits).

[143] *See, e.g.*, Hameen v. Delaware, 212 F.3d 226, 246 (3rd Cir. 2000) (finding that the court did an adequate job of interpreting the Supreme Court and therefore review counts as an adjudication); *see also* Doan v. Brigano, 237 F.3d 722, 730 (6th Cir. 2001) (overturning the Ohio Court of Appeals' dismissal of a Sixth Amendment claim relying on Ohio's evidence rules, without referring to constitutional case law).

different circuits. The continued existence of this divide should not be tolerated.

While the Supreme Court would do well to quickly develop a definition of adjudication in the habeas context, it is certainly unclear which of the many options the Court might choose, or for that matter which is best. It is, of course, necessary to first concede that whatever option is chosen, it must comply with the AEDPA, which is the law of the land, though many federal judges clearly chafe under its strictures. That being said, the method used by the Fourth and Tenth Circuits, which requires independent review of the state court's record in order to determine if the decision was unreasonable under Supreme Court precedent, seems to be the most viable option.[144] This independent review seems to best balance the statutory requirements of the AEDPA with the need for federal courts to base their review of state decisions on some substantive law and legal analysis. The difficulty with this method is that it could often result in federal courts formulating a number of plausible grounds for a cryptic state court decision, and then deferring to one of them under Section 2254(d)(1), even though the state court itself dismissed the claim on procedural grounds or perhaps unreasonably applied an ill-conceived legal theory. Additionally, this approach results in the procedurally awkward result of a federal court deferring to itself, despite its own best judgment, because the reasoning it supplies for the silent state court is not unreasonable.

It would perhaps be desirable to graft onto the Fourth Circuit's definition some sort of safeguard which would deny deference to the most egregious state court decisions. This would do much to mollify those, like Calabresi, who are clearly concerned with the perceived inferiority of state court constitutional jurisprudence. However, I cannot think of any safeguard which could be clearly formulated, beyond some sort of "reasonableness" standard that would ultimately rely on a judge's discretion. Nevertheless, I stress again that dissatisfaction with the AEDPA should not lead to excessive twisting of "adjudication" so as to neuter the statute or return too much power to federal judges. However one may feel about it, the vast majority of state decisions will be upheld on habeas under the AEDPA no matter which definition is used.

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[144] *See, e.g., Bell*, 236 F.3d at 158 (considering a state court decision to be a full adjudication even if a rationale is absent and denying the presumption of a haphazard review by the state court); *Aycox*, 196 F.3d at 1177 (considering a decision to be an adjudication on the merits absent evidence to the contrary).

CONCLUSION

The clear intent of Congress in passing the AEDPA was to force federal courts into a deferential role in the habeas process, and so they have done. Yet, federal courts have the essential responsibility, obvious from even a cursory review of the history of the Great Writ, to protect the constitutional rights of all citizens from encroachment. The complexity of this debate and the great importance of the issues at stake mandates that the Supreme Court quickly and forcefully resolve the serious circuit split over the meaning of "adjudication." Once "adjudication" is defined, federal courts must then work within the strictures of the Supreme Court's decision and the AEDPA to provide a complete and thorough review of all state court decisions presented on habeas appeal. Whatever the outcome of the debate on adjudication, the writ of habeas corpus must continue to be our great safeguard of essential liberty.